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No. 83-1551

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

BROWN BEAR, INC.,
COMBINED ENTERTAINMENT VENTURES, LTD.,
HAPPY DAY, INC. and
TOM HOLLIS, JR., - - - - - - Petitioners,

versus

COMMONWEALTH OF KENTUCKY, - Respondent.

Brief in Opposition to Petition for Writ of Certiorari from the Supreme Court of Kentucky

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Was the Petition for Certiorari timely filed?
2. Should Certiorari be denied when none of the considerations governing review are present?
3. Constitutionality of the Commonwealth of Kentucky obscenity statute, KRS 531.010, *et seq.*, as written and applied.
4. Constitutionality of the Commonwealth of Kentucky criminal facilitation of obscenity statute, KRS 506.080, *et seq.*, as written and applied.

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COMMONWEALTH OF KENTUCKY, - - *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT

The Respondent respectfully prays that the Petitioners' Petition for a Writ of Certiorari be denied.

OPINION BELOW; JURISDICTION; CONSTITUTIONAL AND STATUTORY PROVISIONS

Pursuant to Rule 34.2 of the Supreme Court of the United States, the subject areas referred to above, with appendixes, have been presented by the Petitioners to the satisfaction of the Respondent. Furthermore, all parties to the proceedings in the Kentucky Courts are listed in the caption.

STATEMENT OF THE CASE

Again, pursuant to Rule 34.2, the Respondent takes issue with only the portions of Petitioners' statement of the case as to be addressed herein.

The two films in question did not have titles but were identified at trial as "Detective Movie" and "Antique Shop Movie." The trial itself was to a jury, not the Court, and the jury's recommendation as to sentence was followed by the Court. Before discretionary review was sought in the Kentucky Court of Appeals and Kentucky Supreme Court, an extensive review as a matter of right was done by the Campbell Circuit Court. The conviction and sentence were affirmed.

REASONS FOR DENYING WRIT

I.

The Petition for Certiorari Was Not Timely Filed.

Rule 20 of the U. S. Supreme Court required this petition to be filed within sixty (60) days after the entry of judgment. The Kentucky Supreme Court entered its final judgment on December 15, 1983, and this petition was not filed until on or about March 15, 1984. No extension was applied for nor any good cause shown for this flagrant delay.

II.

None of the Considerations Listed in Rule 17 Are Applicable in the Case at Bar.

Rule 17 of the Rules of this Court indicates the character of reasons that will be considered in a petition for a writ of certiorari. Since the Kentucky Courts have accepted and followed the applicable federal law, as will be shown herein, the petition should be denied.

III.

The Commonwealth of Kentucky Obscenity Statute, KRS 531.010, *et seq.*, Is Constitutional as Written and Applied.

The Petitioners have raised various issues relating to the constitutionality of Kentucky Revised Statute 531.010, *et seq.* and Kentucky Revised Statute 506.080 as written and as interpreted and applied by the trial court.

In response to movants' arguments, the Kentucky pornography law, KRS 531.010, *et seq.* is not unconstitutional as written or applied in the case at hand nor does it fail to conform to the minimum standards set forth in *Miller* v. *California.* Kentucky's pornography law was specifically revised in 1974 to comply with the Supreme Court's mandate in *Miller* v. *California,* 415 U. S. 15 (1973).

Miller held:

> "The basic guidelines must be: (a) whether the average person applying contemporary community standards would find the work taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable law; and (c) whether the work, taken as a whole, lacks serious, literary, artistic, political, or scientific value." *Miller, supra,* 413 U. S. at p. 24. Under part (b) of the test, it is adequate if the statute, as written or as judicially construed, specifically defines the sexual conduct, depiction of which is forbidden. The court in *Miller* offered examples of what a state might constitu-

tionally choose to regulate: (1. patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.) (2. patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.) *Miller, supra,* 413 U. S. at 25.

KRS 531.010 (section 3) states:

Obscene means:

(a) to the average person applying contemporary community standards, the predominant appeal of the matter, taken as a whole, is to the prurient interest in sexual conduct, and

(b) the matter depicts or described the sexual conduct in a patently offensive way; and

(c) The matter, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(d) sexual conduct means acts of masturbation, homosexuality, lesbianism, beastiality, sexual intercourse, or deviant sexual intercourse, or physical contact with the genitals, flagellation, or excretion for the purpose of sexual stimulation or gratification.

Pursuant to the guidelines of the *Miller* case, it is not necessary to define geographical community and it is not necessary to define prurient interest. The only definition required by *Miller* is that of sexual conduct.

The Kentucky pornography law, KRS 531.010(4), complies with that requirement. *Miller* held that the "state at large" is a constitutionally adequate standard

as to a geographical community. The trial court properly ruled that the geographical community could and should be further limited to the geographical community of Campbell County, Kentucky. In the case of *Hambling* v. *United States,* 418 U. S. 87 (1974), in discussing the issue of geographical community, the court stated as follows:

> "The result of the *Miller* cases, therefore, as a matter of constitutional law and statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding which conclusion the average person, applying contemporary community standards would reach in any given case. Since this case was tried in the southern district of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that community upon which jurors would draw." *Hambling, supra,* at p. 101.

In the case at hand, in that the jurors who were to hear the case were by state law mandated to reside in the community of Campbell County, Kentucky, the trial court properly ruled that the geographical community whose standards were to be considered, was the community of Campbell County, Kentucky, where the jurors came from. Although argued by the Petitioners, the record does not include any reference to the population of Cincinnati, Ohio, nor of adjoining Kentucky counties.

Furthermore, it is not necessary to define the specific illegal acts that are prohibited under KRS 531.010, *et seq.* These acts are not of a technical nature, and, therefore, are understandable by a reasonable person without further defining them. See *Gateway Construction Co.* v. *Wallbaum,* 356 S. W. 2d 247 (1961). Certainly, a reasonable person with common intelligence can understand what it means to prepare, publish, print, exhibit, distribute and offer or possess with intent to distribute obscene material.

The application of the statute in question does not reach activities which are absolutely protected by the First and Fourteenth Amendments. Obscene material is unprotected by the First and Fourteenth Amendments pursuant to the *Miller* case. Therefore, the activities which fall under the Commonwealth's pornography laws, KRS 531.010, *et seq.,* are not protected by the First and Fourteenth Amendments based upon their being obscene. KRS 531.010 is in complete compliance with the Supreme Court guidelines and dictates as set out in the *Miller* case. There was, and is, no need for the courts of the Commonwealth of Kentucky to "authoritatively construe" Kentucky's obscenity law as suggested in the *Miller* case in that the Commonwealth's pornography law was specifically revised in 1974 to comply with the mandates of the *Miller* case. The authoritative construction suggested in the *Miller* case was merely an alternative to any actual revision of the state's pornography laws.

It is clear from the above that Kentucky law does not create an impermissible presumption, nor does it suggest that any description of sexual conduct is *per se* patently offensive. It is further clear that the Court's definition of prurient interest was authorized not only in *Miller* v. *California, supra,* but as early as *Roth* v. *United States,* 345 U. S. 476 (1957).

IV.

The Commonwealth of Kentucky Criminal Facilitation Statute, KRS 506.080, Is Constitutional as Written and Applied.

The Petitioners have made numerous and varied attacks upon KRS 531.020 and KRS 506.080 with particular reference to the issue of "knowledge" and the lack of the required knowledge by the Petitioners herein. Initially, it should be pointed out, that as to all the Petitioners, there was an abundance of proof through various sources and means as to the extensive intermingling and knowledge by all the Petitioners of the nature, content and character of the type of material that was being shown at the Cinema X Theatre. The court properly instructed the jury that "knowledge, content and character" means having general knowledge of the nature, content and character of the material. A person has such knowledge when he or she is aware that the film shows or depicts explicit sexual conduct whether or not such person has precise knowledge of the specific contents of the film. Such knowledge may be proven by direct or circumstantial evidence or both. *Hamblin* v. *United States,* 418 U. S.

87, 119-20 (1974); *United States* v. *Orioto*, 413 U. S. 139 (1973); *United States* v. *Thedia*, 484 F. 2d 1149, 1153 (5th Cir. 1973); *United States* v. *Hill*, 500 F. 2d 733, 740 (5th Cir. 1974). Neither KRS 506.080 nor KRS 531.020 are vague or uncertain and both statutes are sufficiently specific in their language to apprise the public, including these Petitioners, as to what conduct is prohibited.

It would be an absurd result if defendants such as the within Petitioners could escape prosecution and responsibility for the distribution of, or facilitating the distribution of, obscene matter unless it was shown that they had seen the specific films in question. Furthermore, three of the four defendants herein were corporations. The type and amount of scienter argued for by the Petitioners would allow for such an absurd result. The facilitation statute in question is not vague and does conform with the Federal Court guidelines as to scienter.

CONCLUSION

As found by the jury in the case at bar, the films identified as "Detective Movie" and "Antique Shop Movie" are obscene. They do constitute hard core sexual material. As such, they have no constitutional protection under the First and Fourteenth Amendments of the United States Constitution. The convictions should be affirmed.

Wherefore, the Commonwealth of Kentucky respectfully submits that all the proceedings of the trial court

were proper and without error, that the Kentucky Court of Appeals and the Kentucky Supreme Court properly denied discretionary review, that there are no special or extraordinary reasons for the U. S. Supreme Court to grant discretionary review, and that, therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATION

I hereby certify that I have, this 5th day of April, 1984, mailed two (2) copies of the foregoing Brief for the Respondent to:

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